The Solicitors' Journal

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Current Topics.

Lord Askwith, K.C.

WITH the death of LORD ASKWITH, K.C.B., K.C., on 2nd June, a link with the days when LORD JAMES OF HEREFORD practised as HENRY JAMES and CHARLES RUSSELL was counsel with him in the *Dilke* case has vanished from the scene. LORD ASKWITH was best known in his later years as an arbitrator in trade disputes, and he had learned much from LORD JAMES OF HEREFORD with whom he had been closely associated in this class of work. He was born on 17th February, 1861, and educated at Marlborough and at Brasenose College, Oxford, where he obtained a first-class honours degree in the modern history school. In 1886 he was called to the Bar by the Inner and Middle Temple and devilled for HENRY JAMES. In 1907 he retired from practice and became assistant secretary to the railway branch of the Board of Trade. In 1908 he took silk and in 1909 he was appointed Comptroller-General of Patents. He did not take up the post, and was appointed Comptroller of the General Commercial Labour and Statistical Departments, and Chairman of the Fair Wages Advisory Committee. In 1911 he became Chief Industrial Commissioner, and in 1912 he was given an honorary D.C.L. of the University of Oxford. In 1919 he retired from the post of Chief Industrial Commissioner, and in the same year he was made an honorary fellow of his college. He obtained his K.C.B. in 1911 for his amazing success in connection with the railway and dockers' dispute. Among the notable offices he held was his chairmanship, during the last war, of the Government Committee of Arbitration under the Munitions of War Acts. His lighter interests led him to the chairmanship of the Royal Society of Arts (1922–1924), with which he was connected as vice-president until last year. He was also president of the British Science Guild from 1922 to 1927. In 1934 he was a member of the panel for commissions of inquiry into the Treaty of Versailles. In 1913 he became the first President of the General Council of the Institut Français and held that post until he retired, a few weeks before his death. In gratitude for his work in this connection he was made a Commandeur de la Légion d'Honneur by the French Government, Commandeur de l'Ordre de la Couronne by the Belgian Government, and received the honorary degree of Doctor of Lille University. His name will long be remembered as an example of the successful application of legal genius to industrial conciliation.

America and the Common Law.

To an English lawyer the development of a kindred system of law is always profoundly interesting. It is almost thrilling, for example, to find that the rule in *Shelley's* case, once the bugbear of law students in this country, now abolished by s. 131 of the Law of Property Act, 1925, is examined in its application to North Carolina in a 32-page article in the issue of the *North Carolina Law Review* for December, 1941. In the same issue is a review of a recent book on "The Law in Shakespeare," by CUSHMAN K. DAVIS, published by the Washington Law Book Company, in which Shakespeare's legal terminology is interpreted. In the issue of the same review for February, 1942, is an appreciation of a new edition of "Blackstone's Commentaries on the Law of England," by BERNARD C. GAVIT, also published by the Washington Law Book Company. Such a publication, whether in England or America, is a legal event of some magnitude, for, although the work went through eight editions from 1769, when it was completed, to 1780, not many more than twenty editions have been published since that date. The writer pays tribute to the "remarkable clearness, grace, and elegance of style at once lucid, precise and comprehensive joined to an orderly and logical development of legal topics." It is interesting to note his comment on Blackstone's statement of the common law rule that if a statute which repeals another is itself repealed, the first statute is thereby revived. It appears that this rule has been changed by Federal statute and by statutes in most of the States. Another interesting comment is made on a statement by the editor that in England the power of Parliament is superior to the courts, and that the latter do not assume or exercise the power to declare an Act of Parliament unconstitutional. The review writer points out that in England "unconstitutional" means "unconventional" and "constitutionality" in the American sense of the word can never arise, because the constitution is of no greater authority than any other statute. Both statements in fact express different aspects of what Dicey, in his "Law of the Constitution," called the "supreme legislative authority or sovereign power" of Parliament. That great authority, in commenting on Blackstone's statement as to the supremacy of the law of nature over all human law (Blackstone, Comm. I, p. 40) said: "There is no legal basis for the theory that judges as exponents of morality, may overrule Acts of Parliament." By way of coincidence, an essay on "Blackstone's Commentaries," entitled "The Mysterious Science of the Law," by DANIEL J. BOORSTIN, has recently been published jointly by the Harvard University Press and the Oxford University Press, and Dr. T. ELLIS LEWIS, writing in the current "Cambridge Law Journal" on this "fascinating and original study," points out that in spite of the complexities and contradictions in the law, "Blackstone succeeded in demonstrating to the people of America and England . . . that it was in accordance with the best scientific notions of the day." Blackstone's work is, without a doubt, one of the finest of the common traditions which the two great democracies are fighting to preserve.

Penal Development.

WHAT must be ranked as one of the most important publications of the present war has been issued by the Squire Law Library, Cambridge, as one of the pamphlet series of English Studies in General Science Its title is "Penal Reconstruction and Development," and it is an account of the proceedings of the conference held in Cambridge on 14th November, 1941, between representatives of nine allied countries and of the Department of Criminal Science in the University of Cambridge. The *Canadian Bar Review* extended the hospitality of its columns to the committee for its publications, and the pamphlet is a reprint by permission from that *Review*. The preface recalls that in 1872 there assembled in the hall of the Middle Temple, London, delegates of twenty-two countries to form the International Congress on the Prevention and Repression of Crime. "It was no accident," state the authors of the preface, "that the violations of international law which the world has witnessed in the last ten years have been accompanied, and, indeed, preceded by violations of the principles of criminal justice in the municipal systems under Axis influence." Those nations who are now fighting to restore freedom "feel that the restoration of a proper system of criminal justice is essential to the establishment of social security and of international order." The members of the conference included Ministers of Justice from Belgium, France, Greece, Luxemburg, Norway and Yugoslavia, and Ministers of State from Czechoslovakia and Poland and some representatives of Oxford and Cambridge law schools. The inclusion of such world-famous names as BENES, DE MOOR, STEFAN GLASER, Professors WINFIELD, GUTTERIDGE and GOODHART in the membership of this conference, is a sort of guarantee of security in a post-war world order. The conference established an international commission on a permanent basis to formulate agreed principles which can be applied in the reconstruction and subsequent development of penal systems, and adopted a motion that His Majesty's Government be solicited to consider the possibility of their participation

in the activities of such commission, and Dominion Governments, the U.S.A., and other appropriate Governments be similarly approached. The contents of the present pamphlet are eloquent of the mental equipment and achievements of the members of the conference. Dr. J. M. DE MOOR, President of the Netherlands Maritime High Court, presented a report on the Allied Courts in Great Britain, Professor GLASER spoke on the treatment of accused persons, and M. DELIERNEUX read a short note on Rules of Penal Law for Recidivists. A number of speakers emphasised various aspects of the activities of the Department of Criminal Science in the University of Cambridge, which was invited to act as advisers to the commission. The step taken in forming this commission is bold and historic, and will be a landmark in any future account of world recovery.

War Damage (Amendment) Bill.

ON consideration in committee of the House of Commons on 3rd and 4th June of the War Damage (Amendment) Bill, what was in a sense the most important amendment was moved by Mr. BELLENGER, that s. 25 of the principal Act should apply to all contributory properties irrespective of value or use. Mr. BELLENGER said that the amendment raised the most vital controversial principle in the Bill, as s. 25 admitted that in certain cases direct contributors, who may be and often are, mortgagors, can pass to their mortgagees a proportion of their war damage contributions. He pointed out that under the section the householder who bought his house with borrowed money was prejudiced if he happened at the same time to have bought another property, and more than one property was included in the mortgage deed. Another anomaly was that there was a very small class of mortgagors who could pass on a proportion of their contribution. He said that this amounted to enthroning moneylending currency over human effort, endeavour and production. The position was not analogous to the exemption of the mortgagee from liability for fire insurance premiums, as that was part of the mortgage deed, while war damage was never foreseen by the parties to the deed. If the mortgagee foreclosed he would have to pay contribution. The contribution had to be paid out of income, although it was theoretically a capital charge. After some debate, Sir KINGLSEY WOOD replied for the Government that he hoped the committee would dismiss from its mind any question of sinister vested interests. The matter had already been fully debated in both Houses and there had been a typically British compromise. If the mortgagee took the whole of the money compensation for total destruction of the property, the mortgagor was also relieved entirely from the personal covenant. The security of this valuable type of investment must not be disturbed or interfered with. On a vote being taken, the amendment was negatived by eighty-seven votes to fifty-three, and a similar amendment moved by Captain GAMMANS was also rejected by ninety votes to fifty-seven. Another amendment, moved by Captain STRICKLAND, provided that notwithstanding anything in s. 63 of the War Damage Act, 1941, and regulations made under that section, payments should be made to a person who suffered war damage to goods or private chattels prior to the date of the scheme coming into force, on such terms as would have applied had the scheme been in force on that date. Captain WATERHOUSE, Parliamentary Secretary to the Board of Trade, said that there were administrative difficulties in the way of accepting the amendment in its present form, but the Board of Trade had decided in future to waive the deduction of premiums on the first £300 of pre-Act schemes. The amendment was by leave withdrawn. After further debate the Bill was reported, with amendments, to be considered on the next sitting day.

Modern Statutes.

THE debate on statutory language, which recently migrated from the House of Commons to the Press, returned on 2nd June to the House of Commons, when the Committee stage of the Pensions (Mercantile Marine) Bill was reached. Petty Officer ALAN HERBERT, in moving an amendment, said that since the second reading he had had a courteous invitation to visit the Parliamentary Counsel's department, where he saw two distinguished counsel, one of whom had drafted the Bill. He still agreed to differ. The present system of drafting legislation was defended by some on the ground that, though it might not be clear to anybody else, it was clear to H.M. judges. His first comment was that the judges were always saying precisely the opposite. The late LORD BIRKENHEAD had said that the citizen was required to know the law at his peril, while the lawyer, and even the judge, was forgiven for getting it wrong; indeed judges were forgiven for getting it wrong, and that was why we had two courts of appeal and sometimes more. He agreed that it was absurd to expect to make complex legislation understandable to the people, but said that that should be held up as an ideal. The idea of having one document in the House and then issuing a completely different document to explain it was a great surrender to intelligibility. It was also of fundamental importance that Parliament must know what it was doing. Dr. RUSSELL THOMAS, in supporting a new clause containing definitions, said that it was amazing that it should be necessary always to search past statutes for definitions. Brevity was claimed, but brevity was really thrown to the winds. It was better to repeat at length in a Bill than to delve into one dusty tome after another. The Solicitor-General said that if such a clause were accepted it would be difficult to distinguish between the new and the old, and a doubt would be raised as to whether the same meaning was intended. On the same day there appeared in *The Times* from the pen of Sir JOHN MILES, Warden of Merton College, Oxford, a letter in which he wrote that speaking generally, our judges were bound by the letter of statutes, and though lip-service was rendered to the intention of the Legislature, very little was permitted to be done to discover what that might have been. The consequence was that the draftsman was required to set out in his Bill, not general principles, but any possible set of facts which he could conceive as likely to arise. The layman felt that his case was decided not on the merits or on principles of justice, but on the meaning of words. He was not wholly right, but it was wrong that he should have such a feeling. A new Interpretation Act was wanted giving power to judges to interpret statutes as they interpreted case law, by considering the principle and not the mere wording. This would result in simpler drafting, and the statutes would then attain the brevity of a code. The suggestion of Sir JOHN MILES is, we respectfully submit, one of considerable force, and should not be forgotten when the time comes for any radical law reform. At present, any consideration of "the old law, the mischief and the remedy" is only a last resort in the interpretation of statute law. It is difficult to resist the argument that it should be the first.

A Price Control Point.

AN interesting point of law under the price control regulations was raised at Bow Street Police Court on 5th June, when a firm of provision dealers were summoned for selling roasting chickens at more than the controlled price. Two West-end hotel companies were summoned with them for buying the chickens at excessive prices. The circumstances out of which the cases arose were that the transactions, involving some 147 roasting chickens, took place within two months of the coming into operation of the Poultry (Maximum Prices) Order. The maximum price laid down for roasting chicken was 2s. 4d. a lb. The invoice price charged to one hotel company was 2s. 6d. and to another 2s. 6½d. A discount of 2½ per cent. was allowed to both companies, representing ¾d. in the 2s. 6d. Evidence was called for the defence to show that the provision dealers' delivery costs represented just over 1½d. in 2s. 6d., and it was argued that there was nothing in the regulations to prevent a charge being made for delivery. It was put forward by counsel for the defence that the case was not serious, and it had not been suggested that suppliers and buyers had deliberately "put their heads together." The argument that delivery charges could be added to the controlled price so as to make the selling price higher than that permitted was rejected by Mr. DUNNE, who fined the provision dealers £30 and thirty guineas costs and the hotel companies £45 with twenty-five guineas costs each. That the learned stipendiary magistrate is not alone in holding that such arguments for increasing controlled prices would be a wrong application of price-control orders is shown by a report in the *Irish Times* of 23rd May, quoted in the *Irish Law Times and Solicitors' Journal* of 30th May, to the effect that traders forwarding small parcels of tea to customers are not entitled to charge postage in addition to the legal maximum price for the tea, according to a decision of the Cork District Court on 22nd May, when a fine of 50s. was imposed for adding the postage charge to the maximum price. Schedule I of the Price of Goods Act, 1939, sets out a number of matters which must be regarded in fixing permitted increases of price, and among those are cost of materials, expense of manufacturing, cost of premises and plant, maintenance and improvement thereof, rent, insurance premiums, wages, salaries, transport charges and a number of other items of cost. Once it is conceded that cost of production is the main element in price fixing in a controlled medium, it becomes obvious that postage, delivery and analogous expenses are mere items in cost, and are therefore, like the other matters in Sched. I, parts of the price. It is true that in some contracts the purchaser undertakes the cost of carriage in the ordinary course of his business, and it might be argued that this is an entirely separate charge imposed on the purchaser in accordance with general practice. It is difficult, however, to envisage many cases in which a court would incline to such a favourable view of this type of transaction.

Recent Decision.

In *Grade* v. *Director of Public Prosecutions*, on 5th June (*The Times*, 6th June) a Divisional Court (The Lord Chief Justice, HUMPHREYS and ASQUITH, JJ.) held that a revue promoter had been guilty of an offence under s. 15 of the Theatres Act, in that he had unlawfully presented for hire a part of a new stage play before that part had been allowed by the Lord Chamberlain, although the defendant was in the Royal Air Force and could not see every performance. The court held that he would not necessarily be guilty of an offence if he could not possibly be present.

A Conveyancer's Diary.

Liability of Agents for Trustees.

SOLICITORS will, I feel sure, welcome the recently reported decision of Bennett, J., in *Williams-Ashman* v. *Price and Williams* [1942] Ch. 219; 86 SOL. J. 49, which clarifies the position of solicitors, or other agents, who act for trustees who are engaged in committing a breach of trust. The action was one by a beneficiary and the decision is therefore authority on the question whether the beneficiary has any claim against the trustee's agent in such circumstances.

In 1927, one Dr. MacGowan, who was then vicar of Holy Trinity Church, Kingsway, together with two other persons, entered into a deed in which they recited, as settlors, that a sum was standing to their credit at a certain bank, and then went on to declare that Dr. MacGowan and one Streather should hold the said sum on trust to invest the same in trustee investments and to pay the income to the incumbent for the time being of Holy Trinity Church, Kingsway. Shortly afterwards £900, part of the fund, was invested on mortgage of property belonging to a Miss Pullen. All the foregoing arrangements were carried out by the defendant firm of solicitors, whose managing clerk, Franklin, was a churchwarden of Holy Trinity and was also joined as a defendant.

Nine years later, in 1936, Dr. MacGowan asked Franklin to get £200 paid off the mortgage, and Miss Pullen accordingly paid £200 to the defendant firm on 24th June, 1936, who handed it over to Dr. MacGowan. It seems that Dr. MacGowan told the firm that repairs to the cost of some £300 were being done to the vicarage, and that he would pay £100 towards the expense himself and that the £200 out of the settled fund would be so applied. Apparently, the propriety of such an application of the fund was never called in question by any of the defendants; it looks as if they had forgotten about the trust, as well they might, seeing that it was a small matter dealt with many years earlier and one which appears not to have caused any work in the interval. Nearly two months later Dr. MacGowan drew a cheque for £200 and sent it to the defendant firm asking them to apply it in purchasing a certain sort of shares, which, if held by the trust, would have been an unauthorised investment. The sum was duly so applied and the shares were allotted to Dr. MacGowan. On the question of fact arising here, Bennett, J., accepted the evidence of Franklin that (*a*) Dr. MacGowan had told him that he had used his own money for repairs to the vicarage; and (*b*) that he believed that in August, 1936, he was receiving the doctor's own money. His lordship also made it clear (p. 223) that in his view Franklin was dealing honestly and fairly with Dr. MacGowan, and also (p. 222) that neither Franklin nor his principal was conscious that either Dr. MacGowan or Streather was committing a breach of trust. In those circumstances, he held that the defendants were not liable to the plaintiff in respect of this transaction. Such a decision is convenient, in that it means that a solicitor who acts for a client who is committing a breach of trust in doing the very thing which is the breach of trust, is not, by reason only of so acting, liable to make good to the *cestuis que trustent* any loss flowing therefrom. The decision goes, of course, only to the case where the solicitor acts innocently; it would naturally not cover a solicitor who knowingly furthered a breach of trust, and still less one who was fraudulently a party to a breach of trust. The convenience lies in the fact that the materials for discovering that the transaction was a breach of trust were available to the defendants (the trust deed was later discovered in their safe and they had acted in its preparation) but they were held, in effect, not to be under any duty to scrape their memories to discover the material facts. That is the point of general importance; on the particular facts it seems also that it would have been quite unreasonable to expect the defendants to inquire whether a sum sent them by a client for investment was really the same sum as an item of trust property having the same value handed to that client two months earlier. It is well that that should be so; otherwise the burden on solicitors would be intolerable.

In the year 1937 Dr. MacGowan, who had become sole trustee through Streather's death at the end of 1936, asked Mr. Williams, a partner in the defendant firm, to call in the rest of the mortgage debt. The money was subsequently paid to the firm, and they were instructed by Dr. MacGowan to pay £300 to his son and to invest the balance in certain unauthorised investments. All this was duly done.

In 1939 Dr. MacGowan died intestate, and the trust deed was found in the defendant firm's safe. This fact was communicated by the firm to one of the churchwardens, who was invited to set the usual inquiries in hand. Eventually the present incumbent of Holy Trinity Church brought the action, against the firm and Franklin, claiming that the defendants were liable to make good to the trust any losses occasioned by the transactions referred to above. It was this claim which Bennett, J., refused to uphold.

The plaintiff's argument was evidently founded on a passage in "Underhill on Trusts," 9th ed., p. 548, a book of the considerable prestige proper to the works of its author. This passage reads as follows: "Where trust funds come into the custody or under the control of a solicitor, or indeed of anyone else, with notice of the trusts, he can only discharge himself of liability by showing that the property was duly applied in accordance with the trusts." Taken out of its context, that passage does seem to support the plaintiff. But one must read the rest of the paragraph. It is headed "*Trustee de son tort*," an expression which makes it clear that the subject-matter is intermeddling, which is something quite distinct from acting as agent for a trustee who happens to be committing a breach of trust. "Intermeddling" clearly involves the idea that the agent has unnecessarily taken some step of his own motion, and this conception is borne out by Sir Arthur Underhill's first sentence, which states that in general beneficiaries may proceed against an agent of their trustee where he has not confined himself to the duties of an agent, but has himself become a trustee in the eyes of equity "by accepting a delegation of the trust or by fraudulently mixing himself up with a breach of trust." That is the governing clause, and it obviously does not go anywhere near the facts of the case before Bennett, J. Sir Arthur Underhill then gives certain limiting factors, cutting down the broad doctrine, and goes on: "But where the capital of a trust fund having got into the hands of the trustees' solicitor, was, through his intervention, spent by the trustee, the solicitor was held liable"; then follows the passage relied on by the plaintiff, which thus clearly falls into its place as an explanation of the immediately preceding proposition which I have just quoted. The authority cited for that proposition by Sir Arthur Underhill is *Morgan* v. *Stephens*, 3 Giff. 226, which contains, at p. 336, a passage in the judgment of Stuart, V.-C., cited by Bennett, J., to the effect that an agent is accountable if he goes outside his function as an agent. It is not suggested that an agent is liable for being, without fraud, a party *merely as agent of the trustee* to the trustee's breach of trust. And that this was the view of Sir Arthur Underhill is made perfectly plain by the last sentence of the paragraph in question, where it is stated that: "Of course, however, a solicitor would be justified in paying, and indeed would be compellable to pay (the fund) to the whole of the trustees jointly." It obviously follows that the same would be true of a solicitor acting on the direction of a sole trustee, as Dr. MacGowan was, and of a solicitor paying money not to the trustees or trustee, but to their or his order, as was done by the defendants. Accordingly, the plaintiff's case breaks down on an analysis of the passage in "Underhill" on which they themselves relied.

But the matter can be put more positively, as was done by Bennett, J. He pointed out that *Mara* v. *Browne* [1896] 1 Ch. 199 was direct authority that "an agent in possession of money which he knows to be trust money, so long as he acts honestly, is not accountable to the beneficiaries interested in the trust money unless he intermeddles in the trust by doing acts characteristic of a trustee and outside the duties of an agent." All that had happened in the case before Bennett, J., was that the solicitors had accepted and acted on Dr. MacGowan's directions. Perhaps if they had remembered the terms of the trust deed, they might have acted differently, but they did not remember, and the fact that they did not remember did not give the plaintiff a cause of action. Obviously, in a case of this sort, much will turn on whether the court accepts a defendant's account of his own state of mind at the material date, and these defendants evidently impressed the learned judge with their honesty. But it must be cause for satisfaction that the decision establishes that in those circumstances a man acting honestly is not to be mulcted for not having acted differently or officiously.

Our County Court Letter.

Wrongful Dismissal of Traffic Supervisor.

IN *Dawson* v. *Dowson Supply Co., Ltd.*, at Stafford County Court, the claim was for damages for breach of contract. The plaintiff's case was that, on the 3rd January, the defendants had advertised for a transport supervisor for twelve or fifteen lorries. In answer to his reply, the plaintiff was interviewed by a Mr. Mattinson, on behalf of the defendants, who engaged the plaintiff at a salary of £7 10s. a week. The arrangement was confirmed on the 7th January by two directors, and the plaintiff was introduced at various sites as the new transport supervisor. After working for ten days, the plaintiff applied for his wages. These were refused, and he was dismissed without notice. The defendants' case was that the plaintiff had been engaged by Mr. Mattinson for a new firm, which had not actually been formed. The alleged confirmation of the agreement, on behalf of the defendants, was denied. The claim against the defendants was only formulated after the plaintiff had failed to obtain payment of his wages from Mr. Mattinson. His Honour Judge Finnemore held that the plaintiff was taken to the defendants' head office as a suitable candidate for the vacant position. Judgment was given for the plaintiff for £20 14s., with costs.

Landlord and Tenant Notebook.

Nuisance from Landlord's Adjoining Premises.

THE remarkable feature of *Kiddle* v. *City Business Properties, Ltd.* [1942] 1 K.B. 269, from the point of view of this "Notebook," is that no attempt appears to have been made to exploit the tenant-landlord relationship of the parties. I hasten to add that the form of the lease, in particular the wording of the covenant for quiet enjoyment (if any), may account for this omission.

The short facts were as follows: The defendants owned what is popularly called an arcade. In 1936 the plaintiff took a fourteen-year lease of one of the shops. The lease reserved to the lessors the free passage of water from their adjoining buildings through the existing channels. Rainwater passed from the glass roof of the arcade via an almost horizontal gutter-pipe into a vertical pipe along the plaintiff's shop front into the drain. Pipes were inspected regularly by an employee of the defendants, who resided elsewhere in the arcade, until he was called up at the end of 1940. The defendants then made a contract with a firm of builders for quarterly inspection, the first such inspection being due in March, 1941. But on the 29th December, 1940, an air raid did much damage in the vicinity of the arcade, in consequence of which the pipes became choked by ash and debris and the defendants had them cleared by the builders referred to. This process necessitated several visits, the last being on 24th February, 1941. Two nights later there was a heavy rainfall, and on the morning of the 27th February the plaintiff found that the pipes had failed to discharge their function, that rainwater had consequently entered his premises, and that £105 worth of damage had been done to his stock.

The breaches of duty alleged by the plaintiff were various. It was claimed that the damage was due to the defendants' negligence; that they had been guilty of nuisance; and that they were liable by virtue of the principle laid down in *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330. In support of the contention that permitting rainwater to overflow was nuisance, *Humfries* v. *Cousins* (1877), 2 C.P.D. 239, and *Tucker* v. *Newman* (1839), 11 Ad. & El. 40, were cited. In the former, the discharge of sewage on to a neighbour's land was held to be actionable; in the second mentioned case, a reversioner successfully sued the occupier of a building next door to the demised premises for permitting rainwater to drip on to the demised premises.

The defendants argued that this was not a case of adjoining premises at all: the roof and pipes and shop being all parts of the selfsame building. That *Carstairs* v. *Taylor* (1871), L.R. 6 Ex. 217, and *Ross* v. *Fedden* (1872), L.R. 7 Q.B. 661, applied. In the one, a rat having punctured a box into which rainwater was collected from the roof of a building let out in offices, one of the tenants whose premises were consequently flooded sued the landlord, who was in possession of the box; it was held that as that apparatus was there for the common benefit, and there was no negligence on the part of the landlord, he was not liable. In *Ross* v. *Fedden* an action by a ground floor tenant against a second-floor tenant, arising out of a similar inundation, failed in the absence of negligence.

The judgment of Goddard, L.J., sitting as a judge of first instance, was not a lengthy one. Negligence was first of all negatived. The defendants had, of course, shown themselves to be conscious of their duty to take care by instructing the builders, and negligence is a question of fact.

Turning to the issue of nuisance, the learned lord justice made an almost cursory reference to the cases cited on behalf of the plaintiff, treating them rather as decisions which once might have been entitled to respect, but which had outlived their authority. Since *Carstairs* v. *Taylor* and *Ross* v. *Fedden*, so went the judgment on this point, it was settled law that when plaintiff and defendant occupied different parts of the same building—say, two warehouses, two sets of offices, or two flats—and water laid on to the building escaped and did damage, the person from whose part the escape took place was not liable to the other in the absence of negligence.

Little criticism can be levelled at this judgment. True, one of the cases cited on behalf of the plaintiff was actually decided after *Carstairs* v. *Taylor* and the other authority relied on by the defence. But *Carstairs* v. *Taylor* has, I think, the status of a leading case. When illustrating the position by reference to cases of parts of the same building, his lordship made that circumstance the essential condition of the applicability of the principle; it was indeed on these lines that Martin, B., distinguished *Rylands* v. *Fletcher* in *Carstairs* v. *Taylor*, though one would have thought the "common benefit" element—also mentioned by Goddard, L.J.—to be the vital consideration. Lastly, when describing that circumstance as "water laid on to the building," the learned lord justice would again be merely illustrating, for in the case before him the water was not laid on, but was collected in the place whence it escaped for the common benefit of both parties, but the principle would be the same.

But what I propose to discuss in a later article is this: if there had been a covenant for quiet enjoyment in the usual form in the lease between the parties, would the plaintiff, despite *Carstairs* v. *Taylor*, have been able to rely, in the further alternative, on a cause of action sounding in contract?

To-day and Yesterday.

LEGAL CALENDAR.

8 June.—At about three o'clock in the morning on the 8th June, 1717, Gray's Inn was alarmed by an outbreak of fire in some chambers on the third storey of No. 3, Coney Court—as the north half of Gray's Inn Square was then called. The rewards subsequently authorised were as follows: "To Mr. Hind's engine engineer and followers £3 4s. 6d. To St. Andrew's engine engineer and followers £1. To St. Giles' engine engineer and followers £1. To Mr. Wm. Brownjohn's hand engine and his servants 15s. To the firemen of the two insurance offices, viz., the Sun Fire Office and the Hand in Hand Fire Office to them and their followers £4. To several who assisted at the fire the sum of £10 14s. (82 persons at 2s. 6d. each; 6 boys at 1s. 6d. each)."

9 June.—On the 9th June, 1749, "was a trial in the Court of Common Pleas between the boatswain's mate of an East Indiaman plaintiff, and the chief mate, defendant, for beating and bruising the plaintiff; the action was laid for £100 and the jury gave a verdict for the plaintiff with £20 damages."

10 June.—On the 10th June, 1799, Lord Thanet and Mr. Fergusson appeared in the Court of King's Bench to receive sentence for taking part in a riot in the Assize Court at Maidstone, when an attempt was made to effect the escape of Arthur O'Connor the agitator, then on trial. The prisoners were accompanied by the Duke of Bedford and Lord Derby. Mr. Justice Grose, after commenting on the impartiality of their trial, the justice of the conviction and the rank and situation of the offenders, sentenced Lord Thanet to a year's imprisonment in the Tower of London and a fine of £1,000, and Mr. Fergusson to a year in the King's Bench Prison and a fine of £100. After that both were to find sureties for their good behaviour.

11 June.—On the 11th June, 1680, a fine farce was played in the Court of King's Bench when Mrs. Elizabeth Cellier, a lady with "a great share of wit" but "abandoned to lewdness," was tried for treason in fabricating the "Meal-Tub Plot." (The plans for this sham conspiracy were supposed to have been hidden in a meal-tub at her house.) From the first the case for the prosecution tottered. The opening witness, an astrologer named Gadbury, astonished the court by testifying in her favour. The next, Thomas Dangerfield, the main prop of the case, she immediately challenged. She said: "I can prove he was whipped and transported, pilloried and perjured; he is no witness." He had, indeed, been convicted of burglary and of counterfeiting guineas and when his record was read out Chief Justice Scroggs said to him: "I wonder at your impudence that you dare look a court of justice in the face after having been made so monstrous a villain." Mrs. Cellier was acquitted and Dangerfield, who had pleaded the King's pardon, was taken into custody on a technical flaw in it to which she had drawn attention.

12 June.—On the 12th June, 1780, "judgment was moved for in the Court of King's Bench against the person concerned in obstructing the workmen employed by the City of London in making a horse towing path at Richmond. Some objections were made in point of law to the indictment and overruled by the unanimous opinion of the court which set the right of the corporation to improve the navigation of the river in the clearest light, for the Court said that the City was authorised by Act of Parliament to complete the navigation by all ways and means in their discretion. But as the City of London meant merely to establish their right and not to insist on exemplary punishment a nominal fine only was inflicted of 6s. 8d."

13 June.—On the 13th June, 1563, the Inner Temple records note: "Whereas some contentions have been between the two principals of Clifford's Inn and Clement's Inn for the superior room in this our House and elsewhere, it is thought good by the Bench to appoint that both the said principals, with five others out of every of the said Houses, being the greatest ancients there, to have warning to be attendant upon the same Bench on Midsummer Day next to receive at the said Bench such order and direction as shall seem good unto the said Bench, upon their precedents perused for that purpose."

14 June.—Dr. Florence Hensey was an Irishman from Kildare who studied medicine at Leyden, travelled widely on the Continent and practised for some years in Paris, afterwards removing to London. On the outbreak of the Seven Years' War, in 1756, he opened a correspondence with an old fellow-student employed in the French Foreign Office, as a result of which he entered the secret service of the enemy, supplying them with information of the movements and equipment of British warships. His warning of the intended expedition to Rochefort largely contributed to its failure. He was detected at last through the observation of an intelligent postman and tried in the King's Bench on a charge of high treason. On the 14th June, 1758, Lord Mansfield, in moving terms, condemned him to be hanged, drawn and quartered a month later, but on the very day fixed for his execution he was respited and subsequently he was pardoned. After that nothing is known of him.

Rules and Orders.

S.R. & O., 1942, No. 983/L.16.

SUPREME COURT, ENGLAND—FUNDS.

THE SUPREME COURT FUNDS (No. 1) RULES, 1942.
DATED MAY 22, 1942.

I, John Viscount Simon, Lord High Chancellor of Great Britain, with the concurrence of the Lords Commissioners of His Majesty's Treasury, and in pursuance of the powers contained in section 146 of the Supreme Court of Judicature (Consolidation) Act, 1925,* and every other power enabling me in this behalf, do hereby make the following Rules :—

1. In Rule 45, after the words " subject to the provisions of Rules 17, 44," there shall be inserted " 46."

2. The following paragraph shall be added to Rule 45 :—

" (6) Where money is lodged in proceedings under section 3 of the Liabilities (War-Time Adjustment) Act, 1941,† directions of the Court in writing in accordance with Form No. 4 under the signature of a Master, and where money is lodged in pursuance of a scheme made under section 1 of that Act, directions in writing under the signature of the Liabilities Adjustment Officer in accordance with Form No. 33, shall be sufficient authority to the Accountant-General to make the payments therein directed."

3. The following Rule shall be substituted for Rule 46 :—

" 46.—(1) Where any money has been lodged in Court and has been directed to be transferred to a County Court, the Accountant-General shall, on receipt of the Order certify thereon that all the money is in Court and shall send the Order so certified to the Superintendent of County Courts.

(2) The requirements of County Courts in respect of monies to which the last preceding paragraph applies shall be met by means of payments to be made from time to time by the Accountant-General into the County Courts Deposit Account at the Office of His Majesty's Paymaster-General.

(3) Where any money has been lodged in Court in a cause or matter which has been transferred to a County Court, the Accountant-General shall, on receipt of an application in accordance with Form No. 39 (which shall be sufficient evidence of the Order transferring the cause or matter to the County Court), send by post to the Registrar of the County Court a cheque for the amount to be transferred :

Provided that, where after the transfer the cause or matter has been disposed of without any Order having been made in the County Court dealing with the money, the Accountant-General may on receipt of a request in accordance with Form No. 39A pay the money in accordance with the request."

4. The following paragraphs shall be added to Rule 47 :—

" (3) Where securities are directed to be sold in a certain order and the Broker of the Supreme Court is unable to sell them in that order, the Accountant-General may authorise them to be sold in a different order, and where one of several securities mentioned in an Order is directed to be sold and the Broker is unable to sell that security, the Accountant-General may, upon a request signed by the solicitor having conduct of the proceedings, authorise the sale of another security mentioned in the Order in lieu of the security directed to be sold."

5. In paragraph (3) of Rule 70—

(*a*) " 3½ per cent. Conversion Stock 1961 " shall be substituted for " 4 per cent. Consols "; and

(*b*) after " raised under Rule 40 " there shall be inserted " and the accumulation in 3½ per cent. Conversion Stock 1961 of any interest on 4 per cent. Consols credited to the account "; and

(*c*) after " future accumulations of those investments " there shall be inserted " or investments made before the 1st day of July, 1942, in 4 per cent. Consols."

6. The following paragraph shall be added to Rule 74 :—

" (*i*) When lodged under the Liabilities (War-Time Adjustment) Act, 1941, unless directed by an Order."

7.—(1) The following paragraph shall be substituted for the last paragraph of Rule 94 :—

" When a cause or matter has been carried over to the account for unclaimed balances referred to in Rule 97 (*b*), the fact shall be notified on the certificate relating thereto."

(2) The preparation and publication of the quinquennial list or statement of accounts required by Rule 96 shall be suspended for one quinquennial period, and accordingly the Accountant-General shall not prepare the list or statement which would, but for this paragraph, be prepared on or before the 1st day of March, 1943.

8. The following Form shall be inserted in the Appendix after Form No. 32 :—

" Form No. 33.

(S.C. Pay Office No. 33.) S.C. Funds Rule 45 (6).

DIRECTION FOR PAYMENT OF MONEY LODGED IN COURT UNDER SECTION 1 OF THE LIABILITIES (WAR-TIME ADJUSTMENT) ACT, 1941.

Adjustment Office, London (Central),
6, Bedford Square,
Bloomsbury, W.C.1.

Reference Number.....

Ledger Credit : In the Matter of the Liabilities (War-Time Adjustment) Act, 1941.
In the Matter of the Adjustment of the affairs of (name and address of debtor).

Fund in Court.....

To the Accountant-General, Supreme Court Pay Office.

Pursuant to Rule 45 (6) of the Supreme Court Funds Rules, I hereby direct

‡(1) that the sum of £ be paid to of a dividend of in the £ in respect thereof to be paid whenever the funds standing to the credit of the account permit of the payment of such dividend, or

‡(2) that the sums set out in the accompanying schedule be paid to the creditors against whose names and addresses the several sums are set opposite, a dividend of in the £ in respect thereof to be paid whenever the funds standing to the credit of the account permit of the payment of such dividend.

LIABILITIES ADJUSTMENT OFFICER.

Date.....

9. The following Form shall be inserted in the Appendix after Form No. 39 :—

FORM NO. 39A.

Request for payment of Money lodged in an action transferred from the High Court to a County Court.

In the High Court of Justice Division.

Ledger Credit to which the money is standing.....

To the Accountant-General, Royal Courts of Justice, W.C.2.

The above action having been transferred from the High Court of Justice to the.....County Court pursuant to an Order dated .....day of.....19 , I declare that the action has been disposed of without any Order having been made in the County Court dealing with the sum of £ : : paid into the High Court in the said action; and I hereby request that payment of the said sum may be made to—

Mr.....of.....

(Signature of Witness)..... (Signature).....

(Address)..... (Address).....

(Occupation)..... .....

I consent to payment out to the Plaintiff.

Signature (in the case of a firm, one partner to sign. A firm signature cannot be accepted).

.....

A partner in the firm of.....

Address.....

Defendant's Solicitor.

Request for Remittance by Post.

If remittance by post is desired, the payee should fill up and sign the request below, and send the Form, entire, to the Accountant-General, Royal Courts of Justice, W.C.2.

Date.....194....

I request that the above sum may be remitted to me, by post at the above address, by cheque crossed to (insert " my " or " our ").....account at (insert name of payee's bank).....Bank.

Signature (in the case of a firm, one partner to sign as above. A firm signature cannot be accepted).

.....

A Partner in the firm of.....

.....

10. In these Rules, a Rule referred to by number means the Rule so numbered in the Supreme Court Funds Rules, 1927,‖ and " the Appendix " means the Appendix to those Rules.

11. These Rules may be cited as the Supreme Court Funds (No. 1) Rules, 1942, and shall come into operation on the 1st day of July, 1942, and the Supreme Court Funds (No. 2) Provisional Rules, 1941, shall be superseded and replaced by Rules, 2, 6 and 8 of these Rules.

Dated the 22nd day of May, 1942.

Simon, C.

J. P. L. Thomas, } Lords Commissioners of His Majesty's
J. H. F. McEwen, } Treasury.

‡ Delete (1) or (2) as the case may be. ‖ S.R. & O., 1927 (No. 1184), p. 1638.

* 15 & 16 Geo. 5, c. 49. † 4 & 5 Geo. 6, c. 24.

Parliamentary News.

PROGRESS OF BILLS.

HOUSE OF LORDS.

Finance Bill [H.C.]
Read First Time. [9th June.

Land Drainage Provisional Order Bill [H.C.].
Reported without Amendment. [9th June.

London County Council (Money) Bill [H.C.].
Read First Time. [3rd June.

Minister of Works and Planning Bill [H.C.].

Pensions (Mercantile Marine) Bill [H.C.].
Read First Time. [2nd June.

HOUSE OF COMMONS.

Coal (Concurrent Leases) Bill [H.L.]. [2nd June.

Marriage (Scotland) Bill [H.L.].

Royal Naval Volunteer Reserve Bill [H.L.].
Read Third Time. [9th June.

Post Office and Telegraph (Money) Bill [H.C.].
Read Second Time. [2nd June.

War Damage (Amendment) Bill [H.C.].
In Committee. [4th June.

Notes of Cases.

CHANCERY DIVISION.

In re **Lester; Lester** *v.* **Lester.**

Simonds, J. 22nd April, 1942.

Will—Construction—Bequest subject to the payment by the legatee of annuities—Whether charge created.

Adjourned summons.

The testator by his will, dated the 9th February, 1937, bequeathed "the remainder of my shares in W.L., Ltd., and W.D., Ltd., to my said son A" (the plaintiff) "subject . . . (*c*) to the payment by him to my said son J during his lifetime of the sum of £8 per week; (*d*) to the payment by him after the death of J of the sum of £6 per week to the widow of J during her life or until her re-marriage; (*e*) to the payment by him (after the death of the survivor of the said J and his wife or after her re-marriage as the case may be) to their daughter D during her lifetime or until her marriage of the sum of £2 per week." The testator died in 1940. By this summons the plaintiff asked whether the annuities were charged on the shares bequeathed to him.

SIMONDS, J., said that the words of the gift imposed a personal obligation on the legatee accepting the legacy to make the prescribed payments. The only question was whether in addition a charge was created. The result of the authorities was that it was a question of construction in each case. He found it difficult to construe the words used here as creating both a personal obligation and a charge. In *In re Hodge* [1940] Ch. 260; 84 SOL. J. 113, the testatrix devised certain freehold property to her husband "in consideration of" his paying £2 a week to her sister. Farwell, J., held that there was a personal obligation on the husband if he accepted the devise. There was little difference between a bequest "in consideration of" and "subject to." In either case the words were apt to create a personal obligation. On the other hand, where there was no reference to the legatee as the person by whom the payment was to be made, but the property was merely given subject to the payment, it well might be that a charge was created on the property, but not a personal obligation on the legatee. The distinction was fine but real. Here it was rightly contended that there was a personal obligation but he saw no ground for saying that in addition a charge was created. In *In re Oliver*, 62 L.T. 533, Chitty, J., held that the words "he paying thereout" by themselves would have been apt to create a trust but, since the testator had referred to the legacies as "charged" on the properties given to the beneficiary, he was constrained to hold that a charge only, not a trust, was created. Chitty, J., was clearly of opinion that such an expression could not carry the double burden of creating a charge and imposing a personal obligation. Here, as the words imposed a personal obligation on the legatee, he would not be justified in saying that they also created a charge.

COUNSEL: *Fawell; Hayward; Waite; Salt.*

SOLICITORS: *Rider, Heaton, Meredith & Mills*, for *Lenton Lester & Co.*, Walsall; *Joynson-Hicks & Co.*

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

KING'S BENCH DIVISION.

Waterlow & Sons, Ltd. *v.* **Shoreditch Assessment Committee.**

Viscount Caldecote, C.J., Humphreys and Cassels, JJ. 28th April, 1942.

Rating and valuation—Erection of air-raid shelter in factory—Loss of space—Diminution in annual value—Reduction to be made in rating assessment—Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67) *s.* 4—*Rating and Valuation (Air-raid Works) Act*, 1938 (1 & 2 *Geo.* 6, *c.* 65), *s.* 1 (1).

Case stated by London Quarter Sessions.

Waterlow & Sons, Ltd., were the occupiers of a factory in Shoreditch, which appeared with a gross value of £5,000, a net annual value of £4,000, and a rateable value of £1,000 in the valuation list for the borough. No entry in respect of the factory appearing in the supplemental valuation list made for the year beginning on the 6th April, 1940, the company objected to the list, contending before Shoreditch Assessment Committee that the above-mentioned values should be reduced. The committee refused to make any entry in respect of the factory in the supplemental list. The company appealed to quarter sessions. The following facts were established at the hearing of the appeal: During the year ending on the 5th April, 1940, the factory was altered by the construction within it of an air-raid shelter. The sole purpose of the alteration was to provide shelter from enemy air attack, and the shelter was not used for any other purpose. The alterations resulted in reduction of the space available for the company's business, which caused a reduction of £422 in the annual rent which a tenant might reasonably be expected to pay for the factory on the terms specified in s. 4 of the Valuation (Metropolis) Act, 1869. By s. 1 (1) of the Rating and Valuation (Air-raid Works) Act, 1938: "In ascertaining . . . the value for rating purposes of a hereditament, no regard shall be had . . . (*b*) to any structural alterations or improvements to the hereditament . . . made at any time after the hereditament was first assessed, solely for the purpose of affording protection from" hostile attack from the air. It was contended for the company that the construction of the shelter was an "alteration" falling within s. 46 (1) of the Act of 1869; that under the Act of 1938 the value of the factory ought to be ascertained without attaching any value to that part of it consisting of the shelter; and that the factory should be valued *rebus sic stantibus*, that was, with regard to the reduction which had been caused in the hypothetical annual rent. It was contended for the assessment committee that under s. 1 (1) no regard should be had to the alteration in question, whether it caused an increase or a reduction in the value of the hereditament. Quarter sessions allowed the company's appeal, and ordered the factory to be placed in the supplemental list at £4,578 gross, £3,812 net and £953 rateable.

VISCOUNT CALDECOTE, C.J., said that the Act of 1938 supplied monetary inducement to occupiers to erect an air-raid shelter in their premises. At first sight the intention of s. 1 (1) was to prevent a person who had, perhaps, spent a large sum on providing his premises with a shelter from having to bear the burden consequent on an increased rateable value. The words of the subsection seemed apt for that purpose. Here a reduction in value had resulted, and the assessment committee argued that the factory should be assessed as if it were unadded to or unaltered, and their counsel supported that argument because, he said, the Act said that alterations must be ignored altogether. The only interpretation, it was argued, of which s. 1 (1) admitted was that it forbade the application of the ordinary law of rating as laid down in the Act of 1869. It was the duty of the court to interpret an Act according to the intent of its makers. The intention of the Act of 1938 was to prevent a person from having to bear the additional burden, which he would otherwise have to bear according to the ordinary law of rating, after spending money on providing an air-raid shelter. Where the alteration for the purpose of providing such a shelter resulted in a diminished annual value the ordinary law of rating applied, and the premises would be assessed in the new condition in which they were. The order of quarter sessions was right.

HUMPHREYS and CASSELS, JJ., agreed.

COUNSEL: *Macaskie*, K.C., and *Squibb* (for the assessment committee); *Harold Williams.*

SOLICITORS: *The Town Clerk*, Shoreditch; *Paul Urban.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Obituary.

LORD ASKWITH, K.C.

Lord Askwith, K.C., arbitrator in many labour disputes, died on Tuesday, 2nd June, aged eighty-one. An appreciation appears at p. 163 of this issue.

MR. B. HALL.

Mr. Benjamin Hall, solicitor, of Messrs. Hall & Son, solicitors, of Wolverhampton, died on Friday, 30th May, aged seventy-two. Mr. Hall was admitted in 1901.

MR. G. O. MITCHELL.

Mr. George Ogilvie Mitchell, solicitor, of Messrs. Norman Hart & Mitchell, solicitors, of Wardour Street, W.1, died on Saturday, 6th June. Mr. Mitchell was admitted in 1922.

War Legislation.

STATUTORY RULES AND ORDERS, 1942.

E.P. 1016. **Control of Paper** (No. 46) Order, May 27.
E.P. 995. **Export of Goods** (Control) (No. 25) Order, May 26.
E.P. 1033. **Food Transport Order**, 1941. Order, May 29, 1942, amending Directions, April 4.
E.P. 1043. **Fresh Fruit and Vegetables** (Restriction on Dealings) Order, May 30.
E.P. 1030. **Limitation of Supplies** (Misc.) (No. 13) Order, 1941, Gen. Licence, May 28, re Controlled Goods of Class 7.
E.P. 1029. Limitation of Supplies (Misc.) (No. 13) Order, 1941, Gen. Licence, May 28, re Glass Tumblers.
E.P. 1028. Limitation of Supplies (Misc.) (No. 15) Order, May 28.
E.P. 1031. Limitation of Supplies (Toilet Preparations) (No. 3) Order, May 28.
E.P. 1041. **Making of Civilian Clothing** (Restrictions) (No. 10) Order, May 30.
E.P. 1037. Making of Civilian Clothing (Restrictions) Orders, 1942. General Licence, May 29.
No. 1020. **National Health Insurance and Contributory Pensions** (Married Women Emer. Provs.) Regs. May 6.
No. 1019. National Health Insurance (Emer. Duration of Insurance) Regs. May 6.
No. 958. **Price-controlled Goods** (Restriction of Resale) (No. 2) Order, May 23.
No. 996. **War Risks** (Commodity Insurance) (No. 3) Order, May 26.

SOLICITORS' BENEVOLENT ASSOCIATION.

A meeting of the board of directors was held on the 3rd June, Mr. Reginald Bullin, T.D., J.P. (Portsmouth), in the chair. Grants amounting to £1,258 were made from the General Funds, and pensions and grants amounting to £514 were made from the Swann Pension Fund, making a total of £1,772 to thirty-five beneficiaries. Two new members were admitted.

Wills and Bequests.

Mr. Walter Thomas Webb, solicitor, of Dulwich, left £29,064, with net personalty £28,816.

Mr. Henry Firth, solicitor, of Bradford, left £86,166, with net personalty £81,427.